and other benefits due to the plaintiffs from the defendants.

By their statement of claim, the plaintiffs who were the registered co-owners of the said property together with the second defendant, each having a third undivided share alleged that at the request of the second defendant, the co-owners agreed to charge their shares of the said property to Hongkong and Shanghai Bank as security for a loan given by the bank to the first defendant, Delima Suria Sdn Bhd. To facilitate the loan transaction, the plaintiffs gave their powers of attorney to the second defendant, the person in control of the first defendant. The plaintiff further stated that on 2 August 1984, they transferred their respective shares to the first defendant for the purpose of the bank loan. However, since 2 August 1984, the plaintiffs alleged that they had been denied their rights as shareholders of the first defendant because the second defendant had refused to inform them the true state of affairs of the first defendant. Finally, when the plaintiffs made a search at the Registry of Titles, Penang on 22 November 1989, they were informed that the said property had been sold to the applicant for $180,000 where a deposit, $18,000 had already been paid to the defendants. The plaintiffs maintained that they never gave consent to the defendants to sell the said property to anyone. It is lastly pleaded that since 2 August 1984, the plaintiffs had not been given any dividend or had derived any benefits from the first defendant, Delima Suria Sdn Bhd.

From the statement of claim, it is clearly seen that the cause of action is not founded on fraud or allegation of improper dealings in respect of the said property. Nor are they claiming for the return of the said property. The plaintiffs' claim is for entitlement of their shares in the proceeds of sale of the said property and until this claim is determined by the court, they pray for a restraining order against the release of the said sum of $180,000 to the defendants. Looking at the averments and allegations in the statement of claim, they appear to be totally unrelated to the information stated in the solicitors' letter to the registrar and the allegations in the Police Report No 3335/89.

Therefore, based on the facts as gathered from the statement of claim in Civil Suit No 63 of 1990, it is my finding that the information supplied by the second respondent to the registrar in support of his application and upon which information the registrar had acted upon in registering the registrar's caveat with respect to the said property was misleading and is no longer valid. On the other hand, these new facts seem to show no improper dealing at all concerning the said property. In my view, had the registrar been informed of the true facts of the plaintiffs' claim against the defendants she would not have come to her conclusion and exercised her discretionary powers under s 320(1)(a) of the Code. Hence, in view of the plaintiffs' action in Civil Suit No 63 of 1990, the registrar's caveat dated on 3 December 1989 can no longer remain. In the result, I allow this appeal and direct that the said registrar's caveat be cancelled forthwith. In addition, I make an order that the costs of this appeal be paid by the second respondent to the applicant to be taxed by penolong kanan pendaftar. The prayer for damages is disallowed.

Appeal allowed.

Solicitors: *Thillaimuthu & Phock Kin; Shaik Anwar Raja.*

Reported by *Zarinah Marican*

Khoo Teng Seong v Khoo Teng Peng

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NOS S7-25-69-89 AND 25-89-89
LIM BENG CHOON J
15 MAY 1990

Land Law — Private caveat — Land part of estate of deceased person — Beneficiary of estate entitled to a share of general residue of estate — Administration of estate not completed — Whether beneficiary has a caveatable interest in the land — National Land Code 1965, s 323

The respondent in Originating Motion No 25-69-89 had entered private caveats against certain lands. The respondent in Originating Motion No 25-89-89 too had entered caveats against the same lands. The applicant applied in each case for an order, inter alia, for the removal of the caveats.

The two respondents were among the beneficiaries of the estate of one Khoo Boo Gong, deceased, who by his will had given certain directions to the executors and trustees regarding the estate, including that they were to make payment to the beneficiaries of the balance of his ready moneys as soon as possible and in the same manner to pay to the beneficiaries from time to time without undue delay upon conversion into money of any part or the whole of his other assets. The applicant, as executor and trustee, had granted an option to a certain company to purchase the lands, which option was exercised resulting in the execution of a sale and purchase agreement between the applicant and the company. Before the lands could be transferred to the company, the respondent in Originating Motion No 25-69-89 lodged the caveats on the grounds that: (1) he was a beneficiary of the estate; (2) he held a share in the proceeds of the sale of the lands; and (3) the applicant had failed to administer the estate in accordance with the will of the deceased. The respondent in the other originating motion lodged the caveats on the grounds that: (1) he was a beneficiary of the estate of the deceased; and (2) the purchase price was below the open market value of the lands and hence that it was unreasonable to sell the lands at such price.

It was submitted for the applicant that the two respondents had no caveatable interest in the lands since each of them was entitled to only five shares of the residuary properties and the lands were not held in trust specifically for the respondents and hence they could not claim any interest in the said lands.

Held, allowing the applications:

(1) A trustee of property held in trust as well as a beneficiary of any trust property is entitled to enter a caveat pursuant to para (b) of s 323(1) of the National Land Code 1965. But a beneficiary, who is only entitled to a share of the general residue of an estate, has no right to enter a caveat against the property of the estate when no part of the property of the estate has been expressly or impliedly devised and bequeathed under a trust created for his benefit. A beneficiary in order to be a person entitled under the said provision of the Code must show that he is a person entitled to or beneficially interested in the land held under trust for him.

(2) It could not be gainsaid that the administration of the estate of the deceased had not been completed and that the balance of the residue had not been ascertained. That being the case, the respondents had no right in the title to or a registrable interest in any part of the assets of the estate.

Cases referred to

1 *Macon Engineers Sdn Bhd* v *Goh Hooi Yin* [1976] 2 MLJ 53 (refd)
2 *Eng Mee Yong & Ors* v *Letchumanan* [1979] 2 MLJ 212 (refd)
3 *Liew Siew Yin* v *Lee Pak Yin* [1940] MLJ 135 (distd)
4 *Lee Ah Thaw & Anor* v *Lee Chun Tek* [1978] 1 MLJ 173 (distd)
5 *Re Bielfeld (Deceased)* (1894) 12 NZLR 596 (folld)
6 *Guardian Trust and Executors Company of New Zealand* v *Hall* [1938] NZLR 1020 (folld)
7 *Lord Sudeley & Ors* v *A-G* [1897] AC 11 (folld)
8 *Dr Barnado's Homes* v *Special Income Tax Commissioners* [1921] 2 AC 1 (folld)
9 *Corbett* v *Commissioners of Inland Revenue* [1938] 1 KB 5677 (folld)
10 *Commissioner of Stamp Duties (Queensland)* v *Hugh Duncan Livingston* [1965] AC 694 (folld)
11 *George Attenborough & Son* v *Solomon & Anor* [1913] AC 76 (distd)

Legislation referred to

Land Code 1926 (FMS) s 166
Land Code (Sarawak, Cap 81) s 173
National Land Code 1965 ss 323, 327, 329

Izabella de Silva for the applicant.
Ong Chin Beng for the respondent in Originating Motion No 25-69-89.
Ooi Boon Leong for the respondent in Originating Motion No 25-89-89.

Cur Adv Vult

Lim Beng Choon J: By an Originating Motion No 25-69-89 dated 8 September 1989 the applicant, as the sole surviving executor and trustee of the estate of Khoo Boo Gong deceased applied for the removal of the private caveats under presentation No 6618/89 Jilid 104 Folio 150, presentation No 6617/89 Jilid 104 Folio 149 and presentation No 6619/89 Jilid 104 Folio 149 and Presentation No 6619/89 Jilid 104 Folio 151 presented by the respondent, Khoo Teng Peng ('the earlier respondent') against the lands held under CT 16118 lot 40 section 88A, CT 16135 lot 57 section 88A and CT 20982 lot 717 section 88A Town of Kuala Lumpur, District of Kuala Lumpur respectively pursuant to s 327(1) of the National Land Code 1965. By another Originating Motion No 25-89-89 dated 5 December 1989, the applicant also applied for the removal of the private caveats lodged by Khoo Teng Bin ('the later respondent') against the same parcels of land. The grounds for the removal of the caveats in both actions are the same and they are as follows:

(a) the respondent has no interest in the said land;
(b) the respondent does not have any right to claim title to or any registrable interest in the said lands; and
(c) the said caveat (sic) was wrongfully presented by the respondent.

The applicant also sought an order directing such damages as the court should deem fit to be awarded to the applicant pursuant to s 329 of the National Land Code 1965 for the loss suffered by the applicant as the result of the wrongful lodgement of the said private caveats be assessed. The parties agreed to have the two motions heard together as the facts and the laws affecting both motions would be the same and the decision made by the court on one motion would be binding on the other.

The facts that are not in dispute are as follows. Khoo Boo Gong ('the deceased') died on 12 June 1975 leaving a will by which he appointed his wife Madam Teoh Chooi Ghin and the applicant, his eldest son, to be the executors and trustees of his estate. After devising certain specific real properties to his wife and one Loke Kuan Tan, his concubine, he bequeathed to his executors and trustees all the rest and residue of his properties movable or immovable whatsoever nature and wheresoever situated including any property over which he might have power of appointment exercisable by will upon trust to sell, call in and convert the same into money as soon as possible after his demise but with full power to postpone such sale calling in and conversion of any such part or parts of his estate or the whole thereof and for so long as his executors and trustees should at their absolute discretion thought fit ... without beng responsible for any loss arising by virtue of such postponement. The said residue properties were to be held by the executors and trustees upon trust with power to sell, call in or to convert the same into money and after payments of the deceased's debts and funeral expenses the assets of the estate whether in the form of cash or proceeds of the sales calling in or conversion of the movable or immovable properties were to be converted into 100 shares. Each of the 19 beneficiaries was entitled to a certain number of shares of the residuary estate. In the present case, we are concerned only with the two respondents' shares. Each of them was entitled to five shares of the residuary properties. The deceased also directed his 'executors and trustees to make payment to the beneficiaries from time to time without undue delay upon conversion into money of any part or whole of my other assets'. After probate, Madam Teoh Chooi Gin died on 20 March 1985 leaving the applicant as the sole surviving executor and trustee of the estate. The applicant granted an option to a

company known as Rositco Sdn Bhd to purchase the four parcels of land, the subject matter of these actions (hereinafter referred to as 'the disputed lands'). The option was granted on 20 February 1989 and it was exercised by Rositco Sdn Bhd resulting in the execution of a sale and purchase agreement between the applicant and the said company on 18 May 1989. The disputed lands comprising approximately 133,947 sq ft were therefore sold to Rositco Sdn Bhd at $30 psf and the total purchase price amounted to $4,018,410. Before the disputed lands could be transferred to Rositco Sdn Bhd, the earlier respondent entered the private caveats on the said lands. His grounds for the entry of the private caveats were that:

(i) he was a beneficiary of the estate of the deceased;
(ii) he had a share in the proceeds of the sale of the disputed lands; and
(iii) the applicant failed to administer the estate in accordance with the will of the deceased.

The caveats were lodged and registered on 10 August 1989. On 7 September 1989, the later respondent also lodged a caveat over each of the three parcels of land. His grounds for lodging the caveats were that (i) he was a beneficiary of the estate of the deceased; and (ii) the agreement entered between the applicant and Rositco Sdn Bhd for the purchase of the disputed lands at $30 psf was below the open market value and hence it was unreasonable to sell the said lands based on the agreed purchase price.

By reason of the caveats lodged by the two respondents the applicant was unable to affect a transfer of the disputed lands to Rositco Sdn Bhd; hence these two applications to remove the caveats.

At the hearing of the motions, counsel for the applicant submitted (if I understand her correctly) that both the respondents had no caveatable interest in the disputed lands since each of them was entitled to only five shares of the residuary properties. Assuming that the respondents were relying on para (b) of sub-s (1) of s 323 of the National Land Code 1965 to contend that they were persons entitled to lodge the caveats, counsel submitted that it must be shown that they were holding the disputed lands in trust for a third party. Counsel then pointed out that under the will the testator had devised and bequeathed to his trustee all the rest and residue of his properties both movable and immovable of whatsoever nature with power to sell the same. The proceeds of the sales of the residuary properties were to be converted into 100 shares to be held in trust for the 19 beneficiaries in accordance with their respective shares of the said properties mentioned in the will. The disputed lands were not held in trust specifically for the respondents and hence they could not claim any interest in the said lands. In the circumstances, until all the real properties were sold and converted into moneys, it was impossible to assess the worth of the portion of the shares of the respective beneficiaries. Furthermore, the administration of the estate had not yet been completed. Counsel had cited a number of authorities in support of her arguments and I shall be referring to some of them presently.

Counsel for the earlier respondent submitted that he was relying on para (b) of sub-s (1) of s 323 of the National Land Code 1965 to show that the said respondent was a person entitled to lodge the caveats. The scope of that section, according to him, was wide enough to allow a beneficiary of residuary properties to lodge a caveat if the beneficiary was able to show that he was beneficially entitled under any trust affecting land. Counsel went on to say that although the Collector of Estate Duty had allowed a postponement of the payment of the full estate duty, nevertheless, partial payment amounting to nearly $3m had been paid. Furthermore, the executor of the estate had furnished an account of the estate dated 31 December 1988 which showed that the estate was fully administered. On principle and authority the respondents were therefore entitled to lodge the caveats. Counsel too cited a number of authorities to which I shall make reference presently.

Counsel for the later respondent in the main adopted the submission of counsel for the earlier respondent. He however stressed the point that when execution function ended, trustee's function would commence. In the present case, as the properties had been divested from the estate and vested on the executor, he became trustee in respect of the properties. Counsel also referred to a letter dated 5 September 1989 written by the solicitors of the applicant which counsel said was an admission that all the properties of the estate had already been vested in the applicant as trustee. That being the case, the respondent therefore was entitled to caveat the disputed lands as they had an interest in them.

It is useful at this juncture to set out in full the provisions of sub-s (1) of s 323 of the National Land Code 1965 which are as follows:

> The persons and bodies at whose instance a private caveat may be entered are —
>
> (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
> (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
> (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

From s 323(1) it can be seen that only three categories are entitled to enter a caveat. The provisions which need to be considered first is para (a) of s 323(1). The types of persons who fall within s 323(1)(a) may be classified as follows:

(i) any person claiming title to any alienated land;
(ii) any person claiming any registrable interest in any alienated land; or
(iii) any person claiming any right to such title or registrable interest.

The scope of s 323(1)(a) has been commented in the book *National Land Code* by Judith Sihombing at p 600 where it is said:

> The terms 'title to' and registrable interest in this paragraph thus refer to
>
> (a) a claim to ownership of the land which is able to be protected by caveat.
> (b) a claim to an interest which gives the right to immediate registration of an instrument of dealing, ie a registrable interest which is thus able to be protected by caveat.
>
> Any lesser interest is able to be included in the definition of 'any right to such title or interest':
>
> These rights (ie any rights to such title or interest) referred to here would traditionally be defined as unregistrable interests, ie claims to interest which are not capable in their present form of causing a substantive entry to be made on the register ... To be caveatable however these claims must represent claims that can lead to the making of a substantive entry on the register, either because the interest is registrable or because it is one for which equitable relief by way of specific performance (albeit discretionary) can be sought. If the claim does not represent a transaction capable of registration then the claim is *not* caveatable for the caveat procedure is an interim procedure designed to freeze the position until an opportunity has been given to a person claiming a right under an unregistered instrument to regularize the position by registering the instrument.

Judicial opinions voiced in two local cases seem to support the aforesaid commentary of the learned author. The first is *Macon Engineers Sdn Bhd* v *Goh Hooi Yin*[1] where the Federal Court upheld the decision of the trial judge Arulanandom J who held that the respondent, who had merely entered into a contract for the sale and purchase of a property, had a right to enter a caveat against the said property and that the caveat was rightly entered. Ali FJ, one of the three judges hearing the appeal, after a detailed analysis of earlier decisions of the Malayan courts relating to the scope of s 323(a), held at p 56:

> A purchaser of land under an agreement cannot obviously have any registrable interest in land. But he has a right to the land or interest in land against the vendor personally which according to Thomas J (as he then was) in *Bachan Singh* v *Mahinder Kaur* [1956] MLJ 97 is not good against the world as a whole. It will be good against the world as a whole if the vendor executes a legal transfer, that is to say, a transfer executed in the manner required by s 215 of the National Land Code and the transfer is registered in the land office. This is because on the registration of the transfer the purchaser becomes vested with the real legal right to or interest in land. In the case of a vendor who refuses to execute such a transfer the purchaser will have to sue him for specific performance which, if granted, would result in the vendor being compelled by the court to execute the transfer. While waiting for specific performance the purchaser must be able to do something to prevent the vendor from disposing of the land to another buyer or purchaser. He may ask the court for an injunction or he may avail himself of the protection given by the National Land Code. The latter, I think, is comparatively an easier way of protecting his right or interest. If he enters a caveat that is enough evidence to show that he is 'claiming a registrable interest in land.

The second case is the Privy Council case of *Eng Mee Yong & Ors* v *Letchumanan*[2] where Lord Diplock said at p 214:

> The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved ...

and His Lordship went on to say at p 215:

> Their Lordships have already noted the analogy between the effect of a caveat and that of an interlocutory injunction obtained by the plaintiff in an action for specific performance of a contract for the sale of land restraining the vendor in whom the legal title is vested from entering into any disposition of the land pending the trial of the action. The court's power to grant an interlocutory injunction in such an action is discretionary. It may be granted in all cases in which it appears to the court to be just and convenient to do so.

In the present case, it is clear that the two respondents cannot rely on para (a) of s 323(1) to contend that they are entitled under the said paragraph to enter any caveats against the disputed lands. They were therefore driven to rely on para (b) of s 323(1) to establish their rights. No authorities have been cited by counsel acting for the respective parties directly dealing with the scope of para (b) of s 323(1). However that may be, counsel for the respondents seemed to rely strongly on the case *Liew Siew Yin* v *Lee Pak Yin*[3] to support his contention that the respondents were persons entitled under the said para (b) to enter a caveat against the disputed lands. It is to be noted that in the *Liew Siew Yin* case[3] Murray-Aynsley J was posed with the question as to what was a caveatable interest under s 166 of the FMS Land Code 1926 which provided that:

> The grantor of any instrument of trust or a beneficiary or a guardian or next friend of any minor beneficiary or a trustee or any person claiming title to or registrable interest in land may present a caveat ...

The testator's lands in that case were subject to a trust for sale under the will and vested or contingent residuary beneficiaries were held competent to lodge a caveat. The words 'claiming title to or registrable interest in land' was held by the learned judge to qualify the words 'any person' and not to the preceding categories or classes mentioned in the section. It has been however held in *Lee Ah Thaw & Anor* v *Lee Chun Tek*[4] that the decision in the *Liew Siew Yin* case[3] cannot be supported either in principle or on authority. Thus in his judgment in the *Lee Ah*

Thaw case[4] Lee Hun Hoe CJ (Borneo) said at p 176 of the reported case:

> Mention may be made of the case of *Liew Siew Yin & Anor* v *Lee Pak Yin* [1940] MLJ 135 where the plaintiffs were residuary beneficiaries. The court held that irrespective of whether the plaintiffs' interest was vested or contingent and although the land was subject to a trust for sale the plaintiffs were entitled to present a caveat. In my opinion this case was wrongly decided as the whole right of the property was in the deceased's personal representative and until the administration was completed and the residue ascertained the residuary beneficiaries could claim no interest in such property. SK Das, the learned author of the *Torrens System in Malaya* (see p 339), is also of the view that *Liew Siew Yin*'s case [1940] MLJ 135 cannot be supported either in principle or on authority.

It is important to note that (at least from my reading of the *Lee Ah Thaw* case[4]) the provisions of s 173 of the Sarawak Land Code (Cap 81) which the Chief Justice (Borneo) had to consider were substantially similar to the provisions of s 166 of the FMS Land Code 1926. But neither s 166 of the FMS Land Code 1926 nor s 173 of the Sarawak Land Code (Cap 81) can be said to be similar to s 323(1) of the National Land Code. It follows, therefore, that the judicial opinions in the *Liew Siew Yin* case[3] and the *Lee Ah Thaw* case[4] are of not much assistance in the interpretation of the scope of s 323(1) of the National Land Code 1965. It behoves on me to carry out the difficult task of giving a proper construction of the said section. Some assistance can be obtained from textbooks on land law relating to the scope of para (b) of s 323(1). The writers of these books unanimously agree that a private caveat may be entered by a beneficiary under any trust of which the land or interest in the land is trust property. [See Teo Keang Sood and Khaw Lake Tee *Land Law in Malaysia* at p 288, Judith Sihombing *National Land Code* at p 603 and David Wong *Tenure and Land Dealings in the Malay States* at p 432.] From the commentaries of the authors of these textbooks and from my reading of para (b) of s 323(1), I am of the view that a trustee of property held in trust as well as a beneficiary of any trust property is entitled to enter a caveat pursuant to the said para (b). But a beneficiary, who is only entitled to a share of the general residue has no right to enter a caveat against the property of the estate when no part of the property of the estate has been expressly or impliedly devised and bequeathed under a trust created for his benefit. The words 'any such land or interest' appearing in the said para (b) seem to relate back to the land or interest mentioned in para (a) of s 323(1); otherwise the word 'such' is meaningless. That being the position, a beneficiary in order to be a person entitled under the said para (b) must show that he is a person entitled or beneficially interested in the land held under trust for him. An analogous decision in the New Zealand cases is illustrative of such a proposition. The first case is *Re Bielfeld (Deceased)*.[5] There the testator was the lessee of certain land on which he built a restaurant which he carried on to the time of his death. By his will, subject to a life estate and a legacy of £100, he gave the reversionary interest in the leasehold premises to his brother, the caveator. The executor appointed under the will applied to have the caveat removed on the ground that the caveator had no caveating capacity. The ground upon which William J held that the caveator had a caveating capacity appeared to be that the caveator was entitled by the will of the testator not to a mere share in the residue but to the reversionary interest in the specific leasehold premises. In the second case of *Guardian Trust and Executors of New Zealand* v *Hall*,[6] Callan J held that until the residue of a deceased's estate has been ascertained, a beneficiary entitled to a share in such residue is not entitled to or beneficially interested in land forming part of the estate. In his judgment the learned judge made the following pertinent observation at p 1025:

> A caveat is the creature of statute and may be lodged only by a person upon whom a right to lodge it has been conferred by the statute. It is not enough to show that the lodging and continued existence of the caveat would be in some way advantageous to the caveator. He must bring himself within s 146 of the Land Transfer Act. In this case he must bring himself within para (a) of that section — that is to say, he must show that he is a person 'entitled to or beneficially interested in' the land against which he has caveated 'by virtue of some unregistered agreement or other instrument' or 'transmission or of a trust express or implied, or otherwise 'howsoever'.

The legal principle that a legatee of a share in residue has no interest in any property of the testator until the residue has been ascertained and that his right is only to have the estate properly administered and applied for his benefit when the administration is complete has been unanimously voiced by judicial opinions stretching over a period of nearly 100 years. The leading case advocating this principle is the case of *Lord Sudeley & Ors* v *A-G*.[7] Lord Halsbury said in that case at pp 15 and 16:

> The thing that the legatee was entitled to was one-fourth share of a residuary estate, consisting, it may be, of many things; and I think it was fallacious on the part of Mr Channel to say that the residue was very nearly ascertained, because the question is not only of amount — although I think that of itself would not be sufficient if it were only of amount — but it is a question of substance as well as a question of amount. It is uncertain until the residuary estate has been ascertained of what it will consist. It may consist of many things — it may consist of only a sum of money — and until that has been ascertained the actual right capable of instant assertion does not exist; and whether the character is that of executor or of trustee seems to me to be immaterial, because the legatee had no right to go and say 'I will have this or that part of assets'. If a trustee is to be the character filled, the cestui que trust has no right to apply to the trust fund until a trust fund has been constituted, and by the hypothesis the trust fund is not constituted.

Lord Herschell in the same case said at p 18:

> What she had a right to — what they as her executors had a right to — was one-fourth of the clear residue of Mr Tollemache's estate — that is to say, what remains of his estate after satisfying debts and legacies; and a bequest to

> them of one-fourth apart of his residuary estate does not seem to me to vest in them or in her a fourth part of each asset of which that estate consists, as contended for on the part of the appellants. It seems to me, as my noble and learned friend has pointed out, that until the estate is fully administered it is impossible to say of what assets the residuary estate will consist; we do not know how much the amount of the debt remaining unpaid was in the present case, and there was only one legacy unpaid. But the argument would be precisely the same if there had been a large amount of debt and many legacies still unpaid, that could not have made any difference in point of legal effect. Well, in that case how would it be possible to say that any one of the residuary legatees could point to any part of the assets of the testator and say, 'This is a part of my estate', when it depends entirely on the method of administration by the trustees in what form the residue becoming divisible will exist when the administration is at an end?

The third Law Lord in that case, Lord Shand, holding the same view said at p 20:

> There was no allocation of any kind and the trust fund was not in a position to be wound up. Even though the legacies and debts had all been paid I should hold the same view. There were a number of persons having right to the residue and interested in its realization. The claim was really a claim to a share of the residue, and it had never been changed by allocation either by Mr Tollemache's trustees, or by arrangement with the other persons interested, so as to make the right of these executors a right to specific assets.

The law in *Lord Sudeley*'s case[7] was reaffirmed in the same terms in several later cases for example in *Dr Barnado's Homes* v *Special Income Tax Commissioners*[8] and in *Corbett* v *Commissioners of Land Revenue*.[9] In a more recent case of *Commissioner of Stamp Duties (Queensland)* v *Hugh Duncan Livingston*,[10] the Privy Council carried out a thorough discussion of this legal principle. It is therefore useful to examine this case at some length. In that case a testator, one Hugh Duncan Livingston ('Livingston senior') who died domiciled in New South Wales, by his will gave his real estate and the residue of his personal estate to his executors and trustees, of whom his widow was one, on trust as to one-third thereof for his widow absolutely. After the death of her husband the widow came to be known as Mrs Coulson by her remarriage. Livingston senior's assets consisted of real and personal estate in both New South Wales and Queensland. Mrs Coulson died intestate and Livingston senior's estate was at the date of her death still in the course of administration, no clear residue had been ascertained and, consequently no final balance payable or attributable to the shares of residuary beneficiaries had been determined. A claim was made by the appellant under the Succession and Probate Duties Act 1892 to 1955, that the respondent Hugh Duncan Livingston junior, as administrator of the estate of Mrs Coulson or, alternatively, as one of her next-of-kin, was liable to pay succession duty and administration duty in respect of Mrs Coulson's share in the Queensland assets of deceased Livingstone senior on the ground that her death conferred a succession on those becoming entitled to her estate. The question in the appeal before the Privy Council was whether the appellant was entitled to assess the respondent to those duties in respect of the Queensland assets of the unadministered estate of Livingston senior. The findings of the court as summarized in headnote (2) of the reported case was that in the case of an unadministered estate the assets as a whole were in the hands of the executor, his property, and until administration was complete it would not be said of what the residue, when ascertained, would consist or what its value would be. At the date of Mrs Coulson's death, therefore, there was no trust fund consisting of Livingston senior's residuary estate in which she could be said to have a beneficial interest because no trust fund had as yet come into existence to affect the assets of his estate. Livingston senior's property in Queensland, real or personal, was vested in his executors in full right and no beneficial interest in any item of that property belonged to Mrs Coulson, his widow, at the date of her death and succession duty was not therefore payable. In arriving at the finding Viscount Radcliffe who delivered the unanimous judgment of the five Law Lords of the Privy Council raised a few interesting propositions which are relevant to the case before me. The first proposition appears at p 704 of the reported case:

> The testator's assets consisted of real and personal estate in New South Wales and real and personal estate in Queensland. Mrs Coulson died on 8 July 1950, intestate, having married her second husband on 22 June 1950. She thus survived her first husband by less than two years, and at the date of her death his estate was still in the course of administration, no clear residue had been ascertained, and, consequently, no final balance payable or attributable to the shares of residuary beneficiaries had been determined. It is essential to the decision of this case that Mrs Coulson's rights at her death were the rights of a person interested in a dead man's unadministered estate.

Viscount Radcliffe then went on to discuss the legal principle enunciated by the Law Lords in the *Sudeley* case[7] and said at p 711:

> The members of the House who decided *Sudeley* [1897] AC 11 were dealing with a branch of the law that was familiar and well established, and they were dealing with it with the precision that they regarded as being required by the particular issue that was before them. The law as they there stated it was reaffirmed by the House in the same terms in *Dr Barnado's Homes* v *Special Income Tax Commissioners* [1921] AC 1. It is sufficient to quote two short passages from speeches in that case. Viscount Finlay said: '... the legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete'; while Viscount Cave said: 'When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue, as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment

forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purpose of administration'. Similar explicit statements of the true position will be found in the judgments of Lord Sterndale MR, when the *Barnado* case was in the Court of Appeal, and of Sir Wilfrid Greene MR in *Corbett* v *Commissioners of Inland Revenue* [1938] 1 KB 567.

Applying the legal principle discussed above, the question that has to be asked is whether in the present case the personal estate of Khoo Boo Gong (deceased) has been fully administered by his executor and the net residue ascertained.

In my search for an answer to the aforementioned question, the first point which I have taken into consideration is that there is no allegation that the applicant in his capacity as the executor and trustee of the deceased's estate had exceeded his power or wrongly exercised his power. The only complaint is that the applicant is disposing of the disputed land at a purchase price which does not reflect the current market price. The second point which I have considered is that the estate of the deceased is still in the course of administration. In this connection it is to be noted that the applicant had furnished a statement of accounts of 31 December 1988 in respect of the estate. The primary assets of the estate comprised of immovable properties, investments, and 25% share in the estate of one Khoo Chew Pan (deceased). The immovable properties comprised the four parcels of lands in dispute and three other parcels which have yet to be sold. The investments carried out comprised government bonds, stocks and shares of several local corporations and one foreign corporation. These bonds, stock and shares have not yet been realized or sold. The 25% share in the estate of one Khoo Chew Pan (deceased) has not yet been ascertained as the administration of that estate has not yet been completed. What is more important is that although a sum of nearly $3m had been made as partial payment of the estate duty, nevertheless, the remaining estate duty has yet to be assessed. The Collector of Estate Duty had certified that he had allowed the payment of the remaining sum to be postponed. Although some distributions of the assets of the estate were made to the beneficiaries in 1987, the distributions apparently came from the profits derived from the various investments and dividends received from the stocks and shares. From the statement of account of the estate of Khoo Chew Pan (deceased), the assets of that estate also comprised mainly investments made both locally and in foreign countries and some ten parcels of land of which one parcel was held in trust by Khoo Boo Gong (deceased). It was stated that the above real properties were not included as part of the assets of the estate in the balance sheet. I take it that the personal representative of that estate was not able to include the aforesaid real properties as part of the assets of the estate simply because none of the said properties had been valued as the personal representative was not ready to sell any one of the said properties. However that may be, there is no indication from which an inference can be drawn that the residue of the estate of this Khoo Chew Pan of which the deceased in the present case had 25% share is ready for distribution. It is essential to the decision of the present case that part of the assets of the estate of Khoo Bong Gong is derived from its 25% share of another dead man's unadministered estate. Under the circumstances it cannot be gainsaid that the administration of the estate of the deceased had not been completed and that the balance of the residue has not yet been ascertained. That being the case, the respondents have no right in the title to or a registrable interest in any part of the assets of the estate. Counsel for the respondent relied on the case of *George Attenborough & Son* v *Solomon & Anor*[11] to support his contention that the administration of the estate had long been completed and the residue was ready for distribution. It is to be noted that in that case Viscount Haldane LC held that the executors there had assented to the trust dispositions taking into effect because the executors had put in a residuary account showing particulars of the estate of the testator and that all the debts had been paid and the balance of the residue was ready for distribution to the beneficiaries. In the present case, no inference can be drawn from the two statements of account that the executor has given an expressed or implied indication that the administration of the estate has been completed and that the residue has been ascertained.

In the circumstances of this case, I am satisfied that the respondents are not entitled to caveat the lands in dispute. I therefore direct that the private caveats presentation No 6618/89 Jilid 104 Folio 150, Presentation No 6617/89 Jilid 104 Folio 149 and Presentation No 6619/89 Julid 104 Folio 151 presented by the respondent in Originating Motion No 25-69-89 against the lands held under CT 16118 Lot 40, CT 16135 Lot 57, and CT 20982 Lot 717 all in section 88A Town of Kuala Lumpur, District of Kuala Lumpur respectively be forthwith removed pursuant to s 327(1) of the National Land Code 1965. Likewise, the private caveats Presentation No 7762/89 Jilid 107 Folio 28 presented by the respondent in Originating Motion No 25-89-89 against the same lands be forthwith removed pursuant to s 327(1) of the National Land Code 1965. Costs of these proceedings to be paid by the respondents to the applicant.

Applications allowed.

Solicitors: *Chooi & Co; Ong Chin Beng & Rakan-Rakan; Ooi Boon Leong & Co.*

Reported by *PS Ranjan*